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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-833

JOSEPH GOLDMAN,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OPINION BELOW

The opinion of the court of appeals, which has not yet been reported, appears as Appendix A hereto (pp. 1a-8a, *infra*.).

JURISDICTION

The opinion and judgment of the court of appeals were filed on October 14, 1977. A timely petition for rehearing was denied on November 11, 1977 (App. B, p. 9a, *infra*), and this petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the prosecution to introduce evidence that the defendant had refused to answer two questions asked by the FBI agent who arrested him.

2. Whether it was permissible for the prosecutor to refer to the defendant's religion in his summation by arguing that the defendant had "defamed, defiled and scandalized" the religious skullcap that he was wearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

STATEMENT

After a one-and-one-half day jury trial in the District of Rhode Island, petitioner was convicted on one count of transporting a falsely made check in interstate commerce, 18 U.S.C. §2314. He was sentenced to 18 months imprisonment.

The prosecution's evidence at trial showed that petitioner had cashed an $8,000 check in Providence, Rhode Island. The check was made out to him and drawn on a Canadian bank account in the name of Max Lurner. The prosecution presented evidence that the petitioner had opened the Canadian bank account in the name of Max Lurner and that the Canadian account had only a small amount of money in it at the time the check was cashed.

One of the prosecution's three witnesses was the FBI agent who arrested the petitioner. The agent testified that

after taking the petitioner into custody, he gave him the standard FBI "waiver-of-rights" form, which the petitioner signed. The agent then asked the petitioner to empty his pockets. Over objection, the agent was permitted to testify as follows (emphasis added):

> I asked him about the $8,000 check that had been cashed in the Citizens Bank in Providence, Rhode Island, and he admitted cashing the check. I asked him, "Are you in fact Max Lurner, did you open the account at the Canadian Imperial Bank of Commerce in Canada?" He said no, he was not, he did not open the account. I asked him where he had run into Max Lurner, how and under what circumstances did he know Mr. Lurner and he said he had met him a couple of years ago in Toronto. He said he met Lurner a couple of years ago in Toronto, Canada, and he went on to say that he was very interested in the commodities market, that Lurner was doing, had been putting in the money for him to play the commodities market and they were splitting the profits 70-30.
>
> . . .
>
> I asked him if he was aware first of all that the bank in Rhode Island was out the $7,000. He said yes, he was, that he had talked to Mr. Lurner in Jerusalem where he had just returned from. So I SAID, "Well, how did you find Mr. Lurner in Israel?" He said he had found him through some of his cousins in Jerusalem. *I asked him, "Well, how about the name and address of the cousins?" He refused to answer.*
>
> . . .
>
> Q Do you recall any other conversation at that time, sir?

A Yes, I asked him what he was doing with four blank checks on the same account that the Lurner checks were drawn on.

. . .

Q You inquired about those checks of Mr. Goldman, am I correct?

A Yes, I did.

Q *What did he tell you?*

A *Nothing, he didn't respond.*

The petitioner presented no evidence, and the short trial proceeded to final argument. Early in his summation, and over defense objection, the prosecutor emphasized the arresting agent's testimony about the petitioner's silence:

> Now what's the next thing that the agent or you would do if you're looking for someone, trying to prove a point, "Oh, yeah, where are the cousins, how can I reach them?" What does this defendant do — nothing, no comment.
>
> . . .
>
> Wouldn't it be, Mr. Foreman and ladies and gentlemen of the jury, a natural reaction for you to say, "Yes, sure, I'll give you their names and addresses." This defendant stated that Max Lurner told him he'll take care of the check he made in Toronto a couple of years ago. They're in the commodities market, in business together. Wouldn't it be a natural reaction to say, "Sure, I can reach him to prove to you, Mr. Burleigh, that I'm telling the truth." The defendant chose to say nothing and that's significant in your determination as to his guilt or innocence.

Moving on to a different topic, the prosecutor wound up his summation with the following unanticipated remarks:

> This defendant sits before you and you have the right to observe him and you consider in your deliberations his presence in the courtroom. He sits before you with what they call in the Jewish religion a ymaka (sic). I think I asked you when you were selected to appear on this jury whether you would be prejudiced one way or the other because the defendant appeared to be of the Jewish faith. I would hope certainly that wouldn't be true under any circumstances. Why do I mention this? Why do I mention that — because based upon the facts of this case that religious symbol that this man wears has been defamed, defiled, and scandalized.

The defendant objected to this wholly unjustified insertion of the issue of religion into the case, and moved for a mistrial on that ground. The court subsequently instructed the jury that they were to make their determination "from the evidence in this case and . . . without passion, prejudice, objectively." He added that "[a] man's religion or a man's attire has no bearing to the case. It must not enter into your deliberations."

Reviewing the conviction, the court of appeals held that it was not an abuse of discretion for the trial court to admit the FBI agent's testimony that the defendant had been silent in the face of several of the questions asked at the time of his arrest. The court concluded that the petitioner had chosen to make an exculpatory statement at the time of his arrest and had "answered most of the agent's questions probing that statement." (4a) On that basis, the court held that he had waived his right to remain silent and the concomitant right not to have his silence used against him at trial. The court further held that the petitioner's conduct in refusing to answer two of the agent's questions was not a sufficient indication of his desire to remain silent, and that the prosecution was therefore entitled to introduce evidence

of his silence at trial and to comment on it during summation.

As to the comments on the defendant's religion, the court of appeals noted that the prosecutor "showed extremely poor judgment," and added (6a):

> Defendant's religion had no bearing whatsoever on any legitimate issue in the case. Whether or not the statement was prejudicial, it clearly invited the jury to consider religion as somehow relevant. Prosecutorial zeal cannot excuse such grave misconduct.

In spite of this observation, the court of appeals held that the instruction given by the trial court at the close of the summation was sufficient to cure the prosecutor's error.

REASONS FOR GRANTING THE WRIT

1. *The ruling of the court of appeals that petitioner's initial waiver of his right to remain silent permitted the prosecution to introduce evidence of his silence in response to further questioning is inconsistent with prior decisions of this Court.*

In *United States v. Hale*, 422 U.S. 171 (1975), and *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court held that the prosecution may not introduce evidence that a defendant has remained silent after having received the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). In those cases, the prosecution had sought to impeach the defendant with his failure to tell his exculpatory story at the time of his arrest. In *Hale*, the Court ruled that such questioning was impermissible in federal cases, even for impeachment purposes, and in *Doyle*, the Court held that that rule was of constitutional dimension.

Since *Hale* and *Doyle* were decided, lower courts have been faced with the problem of comments on a defendant's post-arrest silence in a variety of contexts. The courts have held, for example, that comment on the defendant's silence is improper, not only to impeach the defendant, but in the prosecution's case in chief as well. *United States v. Impson*, 531 F.2d 274, 276-77 (5th Cir. 1976). Such comment has been held impermissible even if the suspect had not been given his *Miranda* warnings or had not indicated that he was relying on his rights under *Miranda* in choosing to remain silent. *United States v. Impson, supra*, 531 F.2d at 277-78; *United States v. Noel*, 3 Mil. Just. Rep. 328 (C.M.A. Aug. 22, 1977).

Where the defendant has somehow indicated a desire to consult a lawyer before further interrogation, the Fifth Circuit has held that no reference can be made to that expression, even if the defendant's words or conduct were an ambiguous indication of his desire to remain silent. *United States v. Stevens*, 538 F.2d 1203, 1205 (5th Cir. 1977). And even if the defendant has initially made certain statements to the agents before indicating a desire to end the questioning, several courts have held that the prosecution is not permitted to use his subsequent silence against him. *United States v. Johnson*, 558 F.2d 1225, 1228 (5th Cir. 1977); *Boeckenhaupt v. United States*, 392 F.2d 24, 27-28 (4th Cir.), *cert. denied*, 393 U.S. 896 (1968). Other courts, however, including the court below, have held that where the defendant has initially waived his right to remain silent, the prosecution is free to comment on any subsequent refusal to respond to further questioning. See *United States v. Joyner*, 539 F.2d 1162, 1165-66 (8th Cir.), *cert. denied*, 429 U.S. 983 (1976); *United States v. Mitchell*, 558 F.2d 1332, 1334-35 (8th Cir. 1977).

This case thus presents an opportunity for the Court to clarify this troublesome area by defining the scope of a

defendant's rights when he has initially waived his right to remain silent but at some later point has declined to respond to further questioning. The court below conceded that if, by not answering the questions asked by the FBI agent, the petitioner was exercising his right to remain silent, "it is clear that the prosecution would not be entitled to introduce evidence of that silence at trial or to comment on it during summation," (3a) Yet, while recognizing that under *Miranda* a suspect has the right "to [indicate] *in any manner*, at any time prior to or during questioning, that he wishes to remain silent," 384 U.S. at 473-74, the court held that the petitioner's action in refusing to respond to certain questions did not constitute an adequate indication that he wished to reassert his right to remain silent.

This holding is inconsistent with this Court's opinions in *Miranda*, *Hale*, and *Doyle*, and it is contrary to the reasoning of other circuit court opinions as well. The clear implication of the decision below is that in order to prevent any initial reference to his silence during questioning, the defendant who has initially waived his right to remain silent must somehow expressly give notice that he is reasserting his *Miranda* rights.[1] Simply relying on those rights by remaining silent is apparently not enough once an initial waiver is found. Yet this is contrary to the clear provision in *Miranda* that the right to remain silent can be asserted at any point — even in the course of questioning — and that the right to remain silent can be asserted "in any manner."

[1]On rehearing, the court of appeals stated that its holding was simply that the prosecutor could comment on the petitioner's silence because the petitioner's decision not to answer a particular question was "a strategic choice, perhaps based on a fear that any answer might weaken the story." (9a) This analysis, however, does not in any way narrow the implication of the court's ruling. Any time a suspect elects to stop answering questions, that decision could be characterized as a "strategic choice," which could be "based on a fear that any answer might weaken [his] story."

That right, we submit, need not be "asserted" in any formal sense; it is sufficient if the suspect merely provides no answer to an interrogator's question. To require some reference to *Miranda* or some magical incantation to reassert the constitutional privilege would be inconsistent with the plain intention of *Miranda* to facilitate the invocation of the privilege and to construe waivers of the privilege narrowly.

Beyond this, the decision of the First Circuit in this case conflicts with prior decisions of the Fourth and Fifth Circuits. In the Fourth Circuit case of *Boeckenhaupt v. United States*, *supra*, the defendant had initially waived his *Miranda* rights both orally and in writing, and he had submitted to lengthy FBI interrogation. However, the defendant did not respond to two of the questions asked by the interrogating agent. In response to the first question, the defendant said that on advice of his attorney, he did not wish to answer. In response to the second question, he merely gave no answer at all. The court of appeals held that it was error to admit the agent's testimony concerning the defendant's refusal to answer either question. The court drew no distinction between the testimony about the defendant's express statement that he did not want to comment on one of the questions and his simple failure to respond to the second question. The testimony about his failure to respond to the questions, the court held, was improper in both cases.[2]

[2]After finding the testimony improper, the Fourth Circuit concluded that error was nonetheless harmless, since the improper testimony had not been intentionally elicited by the prosecutor, since a curative instruction was given, and since the reference to the defendant's silence was only a very brief portion of the agent's lengthy testimony. No such conclusions would be warranted in this case, where the reference to the defendant's silence was the whole reason the agent was called; where the prosecutor emphasized the defendant's silence in summation; and where the defendant's silence was a prominent element in the very brief prosecution case.

Similarly, in the recent case of *United States v. Johnson*, 558 F.2d 1225 (5th Cir. 1977), the Fifth Circuit held that even though the defendant had initially volunteered certain statements in response to questioning, the prosecution could not constitutionally make use of her subsequent silence in the face of further interrogation. In that case, after stating that she had an innocent explanation for the presence of cocaine in her suitcase, the defendant expressed reluctance to give her full explanation to the customs agents. In response to one of the questions, she stated that she wanted to speak with an attorney before answering; in response to another question, she simply refused to answer. Again, the court drew no distinction between the defendant's invocation of her right to consult with counsel in response to certain questions, and her simple silence in the face of other questions — her "failure to accept the officers' invitation to talk."[3] 558 F.2d at 1230. Unlike the court below, the Fifth Circuit held that it was improper for the prosecution to elicit testimony that the defendant had simply remained silent in response to certain questions, even after having made previous exculpatory statements. See also *United States v. Beard*, 436 F.2d 1084, 1090-91 (5th Cir. 1971).

The principle underlying the Fourth and Fifth Circuit decisions discussed above is simply that the prosecution may not make use of the defendant's silence in response to interrogation, whether or not the defendant has previously waived his *Miranda* rights or made certain exculpatory statements or responded to some of the questions asked. By

[3]Indeed, the court was forced to analyze the two separately, since counsel had not objected to the references to the defendant's statement that she wanted to speak with a lawyer, but had objected to the testimony that she simply did not respond to one of the questions asked by the agents. The court held that both references independently constituted prejudicial error and required that the defendant's conviction be reversed.

rejecting this simple rule in favor of a case-by-case determination of whether the defendant's conduct in a particular case constitutes a sufficiently clear invocation of his right to remain silent, the First Circuit has ignored the dictates of this Court that the prosecution may not in any event use a defendant's silence in response to questioning against him, and it has invited the lower courts to adopt an artificial standard requiring defendants expressly to invoke their right to remain silent if they have once responded to certain questions or waived their right to refuse interrogation altogether. Because this rule is inconsistent with the dictates of this Court and the principle applied by other courts of appeals, the Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

2. *The prosecutor's reference to the defendant's religious attire was so flagrantly improper as to require corrective action by this Court in the interest of the fair administration of justice in the federal courts.*

The prosecutor's explicit mention of the petitioner's religion and his reference to the petitioner's skullcap as being "defamed, defiled and scandalized" had no place whatsoever in the trial. These assertions had no relevance to the issue of guilt or innocence, and it is difficult to perceive any proper purpose that the prosecutor could have thought served by his remarks. We believe there were only two possible interpretations that the jury could have placed in these comments, and both were flagrantly improper.

One possible interpretation of the prosecutor's remarks is that Mr. Goldman should be judged by a higher standard than others simply because he gave the impression of being a devout observer of the Jewish faith. That is plainly not the law, see *State v. Wangberg*, 272 Minn. 204, 136 N.W.2d 853, and any attempt to persuade a jury to return a verdict of guilty based in part on such a notion improperly suggests

there should be separate criteria of guilt for religious observers.

The only other possible interpretation — which we are loath to consider — is that the passage was a disguised call to anti-Semitism. If a prosecutor presenting a case against a black defendant concluded his summation with explicit reference to the defendant's color and then asserted that his conduct had "defamed, defiled and scandalized" his race, the improper and inflammatory quality of the remark would be beyond question. It would be plain that the prosecutor was seeking to capitalize either on racist sentiment within the jury or on a willingness to impose higher standards on a black defendant than on a white one. Either purpose would be improper and would call for reversal. See *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973).

In *United States v. Grey*, 422 F.2d 1043 (6th Cir.), *cert. denied*, 400 U.S. 967 (1970), for example, the prosecutor asked a character witness whether he knew that the married black defendant was "running around with a white go-go dancer." While the question in no way related race or infidelity to crime and did not explicitly condemn interracial relationships, the court reversed the conviction. It said (422 F.2d at 1045):

> At best the entire question was a magnificent irrelevance in a prosecution for bank robbery . . . At worst, the gratuitous reference to the race of the go-go dancer may be read as a deliberate attempt to employ racial prejudice to strengthen the hand of the United States government. The United States needs and desires no such aid.

Ross v. United States, 180 F.2d 160 (6th Cir. 1950), is even more directly on point. Commenting on evidence that the defendants had changed their names from Rosenfeld to Ross, the prosecutor argued (180 F.2d at 168):

> Ladies and gentlemen, this racial phase that has entered into this case, I deplore. I am sorry that it did. We are here under oaths, we are bound to mete out justice, regardless of the race, color or creed of any party. That these boys are Jews, certainly in my opinion, and certainly not in the opinion of any other person is any reflection upon them. Why are they ashamed of what they are? Why, something was mentioned about Hitler calling Mr. Rossevelt, Rosenfeld. Well, I believe it was Hitler that changed his name from Schickelgruber. Yes. Hitler was ashamed of his name. Why ladies and gentlemen, these young men are traitors to their race.

The court of appeals reversed the conviction on the basis of this wholly improper argument. In *Ross*, as in this case, the prosecutor couched his inflammatory remarks in affirmative language. They gave the appearance of seeking to exhort the jurors to put race and religion out of their minds. Superficially, both prosecutors appeared to be lavishing praise on Jewish identity. However, the inflammatory quality of the remarks had the effect — whether or not intended — of injecting a subject of "magnificent irrelevance" and great prejudice in to the jury's determination.

We submit that even an immediate and powerful curative instruction would not have served to eradicate the effects of the prosecutor's highly inflammatory comments from the jury's mind. In this case, however, the instruction given by the trial court was neither immediate nor strong. The court merely advised the jury, at the conclusion of the prosecutor's summation, that "a man's religion or a man's attire has no bearing to this case." In light of the highly improper nature of the prosecutor's remarks the weakness of the curative instruction, and the likely impact of the prosecutor's comments in the context of this very short trial, it is unrealistice to suppose that the court's instruction

rendered the prosecutor's improper statements innocuous. Because the introduction of a matter such as religion into a criminal trial is so flatly contrary to the proper standards of prosecutorial conduct in the federal courts, the judgment of the court of appeals should not be permitted to stand.

CONCLUSION

This case presents two issues of importance to the fair administration of criminal justice in the federal courts, both of which have sparked differing results in different courts of appeals. Accordingly, this Court should grant the petition for a writ of certiorari to consider either or both of these issues.

Respectfully submitted.

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1227

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOSEPH GOLDMAN,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
WOLLENBERG, *District Judge*.*

Nathan Lewin, with whom *Jamie S. Gorelick* and *Miller, Cassidy, Larroca & Lewin*, were on brief, for appellant.
William A. Dimitri, Jr., Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney, was on brief, for appellee.

October 14, 1977

COFFIN, *Chief Judge*. Defendant Goldman appeals his conviction on one count of transporting in interstate commerce a falsely made and forged check. 18 U.S.C. §2314. Goldman cashed an $8,000 check in Providence, Rhode Island. The check was made out to Goldman and drawn on a Canadian bank account containing three dollars in the name of Max Lurner. The government presented testimony that Goldman was in fact the individual who had opened the account as Lurner and that the defendant had four blank

* Of the Northern District of California, sitting by designation.

checks on that account in his pocket when he was arrested. The defendant put on no defense at trial.

We will address ourselves only to the three issues that, as the defendant himself recognized, are the most compelling: (1) whether defendant's decision not to answer certain questions during an interview while he was in the custody of the FBI was an exercise of his Fifth Amendment right not to incriminate himself; (2) whether the prosecutor's remarks concerning the defendant's religion were so prejudicial as to require reversal; and (3) whether the prosecutor commented improperly on the defendant's decision not to take the stand in his own defense.

I.

Agent Burleigh of the FBI arrested the defendant on November 10, 1975. After the arrest and before interrogation Burleigh read the defendant his *Miranda* rights and then gave the defendant a standard FBI "Waiver of Rights" form.[1] The defendant signed this form and,

[1] The form reads in substance as follows:

"YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed_____"

answering Agent Burleigh's questions, gave an exculpatory story, the core of which was that the signature on the check was not forged, but rather was the genuine signature of a business associate, Max Lurner, who had opened the account in Canada.

The defendant objects to the use during the prosecution's case-in-chief and summation of two questions asked by Agent Burleigh during the interrogation to which the defendant either refused to respond or did not respond.[2] Defendant suggests that when he did not answer the questions relating to the location of Mr. Lurner's cousins and his possession of the blank checks he was exercising his right to remain silent. If that were so, it is clear that the prosecution would not be entitled to introduce evidence of that silence at trial or to comment on it during summation.

[2] The exact form of the questions and answers and the sequence of the interview are, unfortunately, not entirely clear from the record because Burleigh's testimony on voir dire and before the jury is not entirely consistent. On voir dire he stated:

"I remarked that it was surprising that he had four other checks in his possession. I asked him where he got them. Again he said Max Lurner had given them to him. I said, 'why would he give you checks especially in blank, what was the relationship between you and Lurner?' He went on to say that Lurner had put up the money for Mr. Goldman to play the commodities market and that the two of them were going to split the profits 70-30. . . . [H]e said that he had just come back from Israel where he talked to, I believe he got in contact with Lurner's cousin in Jerusalem, thereafter contacted Lurner but he was going to come back and straighten the whole thing out. I asked him where in Jerusalem I could find Lurner's relatives and what were their names and he was unable to reply."

Before the jury Burleigh testified, "I asked him, 'Well, how about the name and address of the cousins?' He refused to answer." Later, still before the jury, the following exchange occurred between the prosecutor and Burleigh:

"Q. You inquired about those checks of Mr. Goldman, am I correct?

A. Yes, I did.

Q. What did he tell you?

A. Nothing, he didn't respond."

See Miranda v. *United States*, 384 U.S. 436, 468 n. 37 (1966); *Chapman* v. *United States*, 547 F.2d 1240, 1249 (5th Cir. 1977).

Here, however, as in *Vitali* v. *United States*, 383 F.2d 121 (1st Cir. 1967), the defendant did not stand on his rights. After hearing the *Miranda* warnings, he chose to make an exculpatory statement, and he answered most of the agent's questions probing that statement. We find that these facts meet the high standards of proof of waiver that *Miranda, supra*, 384 U.S. at 475, sets out.

> "A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to. This was not a case where the government commented upon . . . a prior exercise of rights. The government asked the jury to measure what the defendant said when he had no rights because he had voluntarily waived them." *Vitali, supra*, 383 F.2d at 123.[3]

Defendant further argues that even if he did waive his rights initially he was entitled to reassert those rights at any time. The FBI form had advised him that he could stop answering questions at any time. *Miranda* clearly gives a suspect under interrogation the right to "[indicate] in any manner, at any time prior to *or during* questioning, that he wishes to remain silent." 384 U.S. at 473-74 (emphasis added). We can find no passage in the record, however, where Goldman did indicate that he wished to reassert his right to remain silent. The consistent indication, to the contrary, is that he wished to give his interrogator a complete exculpatory story. We find on the basis of the record that he thought he did answer the question about the checks[4] and that his decision not to answer the question about Lurner's Israeli cousins was simply a strategic choice, perhaps based on a fear that any answer might weaken the story.[5] Based on this finding we need not decide what would constitute a sufficient indication of a wish to remain silent, nor need we decide whether the Fifth Amendment gives a suspect the right to answer questions selectively. Because the defendant waived his rights and made a statement, the prosecutor was entitled to introduce that statement at trial and comment on it during summation.

Finally, the defendant argues that choosing not to respond to questions during interrogation, quite apart from constitutional privilege, has no probative value because the silence is ambiguous and may be prejudicial. *See United States* v. *Hale*, 422 U.S. 171, 176, 180 (1975). This case, however, is not controlled by *Hale*. Goldman did not remain silent. What he said provided a context that enhanced the probative value of his silent response to a particular question. Moreover, the jury knows that Goldman was not silent at the time of his arrest, dispelling the particular prejudice feared by the Supreme Court — that the jury would draw a "strong negative inference . . . from the fact that the

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[3] So holding, we need not address defendant's argument, novel to us, that waiver cannot be predicated on the signing of the "Waiver of Rights" form. He contends that, given the pressures of a custodial interrogation, the fact that a suspect cannot acknowledge his understanding of his rights without also agreeing to waive them infects the signing with ambiguity, making it less than clear that there was a voluntary and knowing waiver. The FBI might well give thought to restructuring its form to avoid this kind of objection.

[4] See note 2, *supra*. Defendant explained the checks by alluding to his business deal with Lurner, an explanation suggested, to be sure, by Burleigh's question. This does not mean that Agent Burleigh's testimony before the jury was necessarily inaccurate. It remained true that the defendant had not directly explained why he had the checks.

[5] Because we find that the failure to answer was not a reassertion of rights, we attach no significance to the fact that one or the other of these questions may have been the last question in the interrogation.

defendant remained silent at the time of his arrest." *Id.* at 180. We are satisfied that admitting this evidence was not an abuse of discretion.

II.

Defendant next complains about the following statement by the prosecutor during summation:

> "This defendant sits before you and you have the right to observe him and you consider in your deliberations his presence in the courtroom.He sits before you with what they call in the Jewish religion a yamaka [sic]. I think I asked you when you were selected to appear on this jury whether you would be prejudiced one way or the other because the defendant appeared to be of the Jewish faith. I would hope certainly that wouldn't be true under any circumstances. Why do I mention this? Why do I mention that — because based upon the facts of this case that religious symbol that this man wears has been defamed, defiled and scandalized."

The prosecutor showed extremely poor judgment. Defendant's religion had no bearing whatsoever on any legitimate issue in the case. Whether or not the statement was prejudicial, it clearly invited the jury to consider religion as somehow relevant. Prosecutorial zeal cannot excuse such grave misconduct.

Nonetheless, we are loath to apply a rule that such a reference to religion necessarily requires reversal. At the close of the prosecutor's argument the judge told the jury, "[Y]ou find the facts from the evidence in this case and you do so without passion, without prejudice, objectively. A man's religion or a man's attire has no bearing to the case. It must not enter into your deliberations." He made a similar statement during his general instructions after the close of the defense argument. We hold that the trial judge, by his prompt and definite instruction, cured the prosecutor's error. *Cf. Taglianetti* v. *United States,* 398 F.2d

558, 566 (1st Cir. 1968) ("highly improper" argument by criminal prosecutor cured by prompt instruction to disregard the argument and decide the case on the evidence alone); *aff'd,* 394 U.S. 316 (1969).

III.

Also in his closing argument the prosecutor said,

> "That stands uncontested because in cross examination by defendant's counsel there was no question about that, no question as to the checks were found on his person. That stands uncontradicted based on the cross examination of the testimony."

This statement comes perilously close to running afoul of the rule we stated in *United States* v. *Flannery,* 451 F.2d 880, 881 (1st Cir. 1971), making use by the prosecutor during closing argument of such words as "uncontradicted" prejudicial as a matter of law "when it is apparent on the record that there was no one other than himself whom the defendant could have called to contradict the testimony." Again, we cannot see why the prosecutor chose to hand the defendant an issue on which to appeal.

Having considered the prosecutor's summation, however, we have decided that it does not require reversal. The prosecutor may focus on the absence of impeachment during cross-examination so long as his comments are "sufficiently circumscribed and [do] not necessarily implicate appellant's assertion of his fifth amendment right" not to take the stand in his own defense. *United States* v. *Hooker,* 541 F.2d 300, 307 (1st Cir. 1976). We might construe the prosecutor's words to refer to the absence of a defense witness to contradict the government's case. This would be a serious problem since the defendant himself might be the most natural witness. But the prosecutor did add phrases limiting his remarks to cross-examination, and the judge promptly instructed the jury that it was to decide whether or not particular testimony stood uncontradicted. Later he in-

structed that the entire burden rests on the government, that the defense has a right to present no evidence, and that the closing arguments are not evidence. For these reasons we conclude that the defendant was not denied a fair trial. *See id. See also Lussier* v. *Gunter,* 552 F.2d 385 (1st Cir. 1977).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 77-1227.

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH GOLDMAN,
Defendant-Appellant.

Before COFFIN, Chief Judge,
cAMPBELL, Circuit Judge
and WOLLENBERG, District Judge*

MEMORANDUM AND ORDER

Entered November 11, 1977

We deny the Petition for Rehearing because petitioner has failed to present relevant new material. The recent cases cited by petitioner are not relevant because we did not decide that a suspect must formally assert a right to stop answering questions. Rather we predicated our ruling on the clear indication in the record that petitioner "wished to give his interrogator a complete exculpatory story [, that] . . . he thought he did answer the question about the checks and that his decision not to answer the question about Lurner's Israeli cousins was simply a strategic choice, perhaps based on a fear that any answer might weaken the story." *United States v. Goldman,* No. 77-1127, slip op. at 5 (1st Cir. October 14, 1977) (footnotes omitted). Petitioner's other issues in his Petition for Rhearing were raised in his brief. We have already decided them.

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*Of the Northern District of California, sitting by designation.

Although we deny the Petition for Rehearing, we cannot say that a petition for certiorari in this case will be "frivolous, or filed merely for delay." Local Rule 17. Therefore mandate will be stayed for 30 days pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

So ordered.

By the Court:

/s/ Dana H. Gallup
Clerk.

FILED
FEB 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-833

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 563 F. 2d 501.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1977. A petition for rehearing was denied on November 11, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment privilege against compelled self-incrimination was violated by

testimony that, in the course of responding to questions by agents of the Federal Bureau of Investigation after his arrest and after having waived his right to remain silent, petitioner failed to answer two questions.

2. Whether petitioner was deprived of a fair trial by remarks in the prosecutor's closing argument.

STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of causing a falsely made and forged check to be transported in interstate or foreign commerce, in violation of 18 U.S.C. 2314. He was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that on August 15, 1975, a check in the amount of $8,000 was deposited in petitioner's account in the Citizen's Bank of Providence, Rhode Island (Tr. 13, 17). The check, which was made payable to petitioner and was signed "Max Lurner," had been drawn on a Canadian bank account that had a balance of only $3.09 (Tr. 78). Petitioner, using the name "Max Lurner," had opened the Canadian account two days earlier (Tr. 85-89). Before the check was returned to Citizen's Bank by the Canadian bank due to insufficient funds, Citizen's Bank had distributed more than $7,000 from petitioner's account (Tr. 16).[1] Statements mailed by Citizen's Bank to the address shown on petitioner's signature card were returned to the bank stamped "addressee unknown" (Tr. 24-25).

[1]Prior to the deposit of the $8,000 check, the balance in petitioner's Citizen's Bank account was less than $100 (Tr. 12-13).

2. Petitioner was arrested by F.B.I. Agent James Burleigh on November 10, 1975 (Tr. 138-140). At trial, Agent Burleigh testified that he had read petitioner his *Miranda* rights and that petitioner had signed a waiver of rights form (Tr. 141-142).[2] The agent then questioned petitioner, who freely admitted that he had cashed the $8,000 check drawn on the "Max Lurner" account at the Canadian bank, but denied that he was Lurner or that he had opened the Canadian account (Tr. 142). Petitioner explained that he and Lurner were involved together in the commodities market and that he had recently seen Lurner in Jerusalem (Tr. 143). Agent Burleigh then testified (*ibid.*):

> So I said, "Well, how did you find Mr. Lurner in Israel?" He said he had found him through some of his cousins in Jerusalem. I asked him, "Well, how about the name and address of the cousins?" He refused to answer.

Agent Burleigh also told the jury that, other than a description of Lurner, petitioner gave him no information concerning Lurner or his relatives and that, when the agent inquired about petitioner's possession of four blank checks from the Lurner account at the time of his arrest, petitioner "didn't respond" (Tr. 144-145).

1. Relying on *United States* v. *Hale*, 422 U.S. 171, and *Doyle* v. *Ohio*, 426 U.S. 610, petitioner contends (Pet. 6-11) that the introduction of evidence that he failed to answer certain questions during his interview by Agent Burleigh violated his Fifth Amendment privilege against self-incrimination. In *Hale* and *Doyle*, this Court held

[2]The contents of the waiver form signed by petitioner are set forth in the opinion of the court of appeals (Pet. App. 2a n. 1).

that a defendant's post-arrest silence, after having received *Miranda* warnings, could not be introduced to impeach his exculpatory testimony at trial. The rationale for these decisions was that

> [t]he warnings mandated by [*Miranda*], as a prophylactic means of safeguarding Fifth Amendment rights, * * * require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.

Doyle v. *Ohio*, *supra*, 426 U.S. at 617. See also *United States* v. *Hale*, *supra*, 422 U.S. at 177. The court of appeals correctly concluded that this rationale was inapposite in the context of this case and that petitioner's statements and refusals to answer were properly introduced for their probative value.

Unlike the defendants in *Hale* and *Doyle*, petitioner affirmatively waived his right to remain silent, voluntarily submitted to interrogation, answered a number of Agent Burleigh's questions, and never expressed a desire to end the interview. Having chosen to offer an exculpatory version of his actions, petitioner's selective refusal to respond to questions was not "insolubly ambiguous," and certainly did not suggest that petitioner's silence constituted an assertion of his constitutional rights, but rather strongly indicated that he had no satisfactory answers to the agent's inquiries. As the court of appeals observed (Pet. App. 5a), the record shows that petitioner's refusal

to answer "was simply a strategic choice, perhaps based on a fear that any answer might weaken [his] story." Moreover, in light of petitioner's decision to waive his right to remain silent, no fundamental unfairness inheres in using against him his failure to respond to certain difficult questions. In sum, Agent Burleigh's testimony was properly admitted at trial. See *United States* v. *Mitchell*, 558 F. 2d 1332, 1334-1335 (C.A. 8); *United States* v. *Berdick*, 555 F. 2d 1329, 1331 (C.A. 5), certiorari denied, No. 77-368, January 9, 1978; *United States* v. *Joyner*, 539 F. 2d 1162, 1165-1166 (C.A. 8), certiorari denied, 429 U.S. 983.[3]

2. Petitioner contends (Pet. 11-14) that he was deprived of a fair trial because the prosecutor referred during closing argument to petitioner's wearing a religious skull cap and suggested that the "religious symbol that this man wears has been defamed, defiled, and scandalized" (Pet. 5).

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[3]None of the cases cited by petitioner is in conflict with the decision below or establishes this to be a "troublesome area" (Pet. 7) requiring clarification by this Court. In *United States* v. *Impson*, 531 F. 2d 274 (C.A. 5), *United States* v. *Stevens*, 538 F. 2d 1203 (C.A. 5), and *Scarborough* v. *Arizona*, 531 F. 2d 959 (C.A. 9), the defendant did not sign a waiver of rights form, and his refusal to answer questions after his arrest was complete rather than selective. In *United States* v. *Johnson*, 558 F. 2d 1225 (C.A. 5), the defendant's silence was expressly based upon a desire to contact an attorney, while in *Boeckenhaupt* v. *United States*, 392 F. 2d 24 (C.A. 4), certiorari denied, 393 U.S. 896, a case decided prior to *Hale* and *Doyle*, the defendant's refusal to answer occurred after consultation with counsel. Hence, in both cases the defendant's conduct was "insolubly ambiguous" because it may have evidenced a determination to assert constitutional rights. Here, by contrast, petitioner's failure to respond to two of Agent Burleigh's many questions after signing a *Miranda* waiver unquestionably indicates his reluctance to answer a difficult question for tactical reasons rather than a decision to exercise his privilege against self-incrimination.

While we join the court of appeals in strongly disapproving these remarks, we agree with the court that any prejudice to petitioner as a result of the comments was substantially eliminated by the judge's curative instructions. See *Sawyer* v. *United States,* 202 U.S. 150, 167-168. Immediately following the government's closing argument, the court reminded the jurors (Tr. 183):

> In your consideration of this case in your jury room you look to the facts, members of the jury, as you find the facts, as you find the facts from the evidence in this case and you do so without passion, without prejudice, objectively. A man's religion or a man's attire has no bearing to the case. It must not enter into your deliberations.

The court returned to this point during its final instructions, stating that "you must disregard the argument made to you as to this man's religion or this man's dress in this courtroom, that is no part of your deliberation" (Tr. 193).

Viewed in the context of the entire trial and closing argument, the prosecuting attorney's comments were not "of a kind the jury could not put out of its mind after having been told to do so." *Taglianetti* v. *United States,* 398 F. 2d 558, 566 (C.A. 1), affirmed, 394 U.S. 316. Rather, the remarks, albeit unfortunate, "were minor aberrations" and certainly were not "cumulative evidence of a proceeding dominated by passion and prejudice * * *." *United States* v. *Socony-Vacuum Oil Co.,* 310

U.S. 150, 239-240. Especially in light of the overwhelming evidence of petitioner's guilt, the prosecutor's isolated statement could not have influenced the jury's verdict.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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JANUARY 1978.

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[4]Petitioner admitted at the time of his arrest that he had deposited the fraudulent Canadian check in his Rhode Island bank account (Tr. 142), and he was positively identified as the man who had opened the "Max Lurner" account in Canada (Tr. 85-87). When arrested, petitioner had in his possession four blank checks from the "Max Lurner" account (Tr. 144). Compare *United States* v. *Grey,* 422 F. 2d 1043 (C.A. 6), certiorari denied *sub nom. Williams* v. *United States,* 400 U.S. 967, relied upon by petitioner, where "the facts [were] such as to indicate that such prejudicial tactics may have had a substantial influence upon the result of [the] trial" (422 F. 2d at 1046).

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Supreme Court, U.S.
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FIRST CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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---

1. The Solicitor General argues that it was not error to present to the jury evidence that the petitioner was silent in response to some questions asked in a post-arrest interrogation because petitioner waived his Fifth Amendment rights by signing the FBI's "waiver-of-rights" form.[1] This response (Br. in Opp. 4-5) overlooks the fact that such a form is signed at the *outset* of an interrogation, and that the right asserted here — the right to remain silent "at any time prior to *or during questioning*" (*Miranda v. Arizona*, 384 U.S. 436, 473 (1966)) — may be asserted "in any manner." *Ibid.* By its very nature, the right to *stop* answering questions must come after a period of time when a suspect *does* answer questions. To say, as the Solicitor General now does, that a suspect who begins answering will be presumed to have stopped because of a "strategic choice" is to eliminate altogether the constitutional right — recognized in *Miranda* — "to cut off questioning." 384 U.S. at 474. What precise words should the petitioner have used in answer to the FBI agent's continued questions if he wanted to exercise his right to "cut off" questions rather than making the "strategic choice" that the Solicitor General now asserts that he made? We submit that the course petitioner took is precisely what the Constitution and *Miranda* protect — he remained silent when asked another question. And that silence has now been used against him.

[1] Even the Court below had some doubt whether the form really gave a suspect a meaningful opportunity *not* to waive his rights. It said: "The FBI might well give thought to restructuring its form to avoid this kind of objection." Pet. App. 4a, n.3.

2. The prosecutor's appeal to religious prejudice in his summation is deplored by the Solicitor General (Br. in Opp., p. 6) — as well it must be. The Solicitor General argues, however, that the appeal to passion was cured by the judge's instructions. In fact, however, the instruction was not made "immediately following" the remark. Defense counsel objected when the statement was made, and the judge then instructed the jury on a totally different matter. Thereafter, the prosecutor was permitted to conclude his argument. Only after the argument was finished and defense counsel raised the issue again and moved for a mistrial did the judge take any action. At that point — much too belatedly, we submit — the judge gave a moderate instruction which did not criticize the prosecutor in any manner. (We have reproduced the relevant portions of the transcript as an Appendix to this Memorandum.)

An even more fundamental error that pervades the Solicitor General's response to this argument is the suggestion that a judge's neutral instruction can cure an improper appeal to religious bias of the kind made here. A

judicial instruction may effectively eliminate from the jury's consideration an element of proof that appeals to the jurors' sense of reason; it is not likely to be effective when the remark which jurors hear is one that plays on their emotions. Words cannot make our point as well as it is illustrated in the drawing on the following page, taken from *The New Yorker* of October 3, 1977.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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"The jury will disregard the witness's last remarks."

APPENDIX

MR. DIMITRI: He sits before you with what they call in the Jewish religion a yamaka. I think I asked you when you were selected to appear on this jury whether you would be prejudiced one way or the other because the defendant appeared to be of the Jewish faith. I would hope certainly that wouldn't be true under any circumstances. Why do I mention this? Why do I mention that — because based upon the facts of this case that religious symbol that this man wears has been defamed, defiled and scandalized.

MR. DeCELLES: Objection.

THE COURT: Just a moment. There are two things I must tell you, members of the jury. The prosecutor said that the defendant chose to say nothing. Now, there is an absolute right in argument to a jury to review the evidence as the person arguing recalls that evidence. That's perfectly permissible. I told you in my instructions, however, that you and you alone must decide what the facts are and what the defendant's counsel or the prosecutor tells you is not evidence. You must always bear in mind, however, that the defendant has a right to remain silent. You should never erase from your minds that in a criminal case there is no burden whatsoever on the defendant to prove or disprove anything. The entire burden is always on the Government. Now, I felt I had to tell you that and as far as this point is concerned I would suggest that we carry on in a different vein at this time.

MR. DIMITRI: Yes, Your Honor. By the way, I don't want to give you the wrong impression. I certainly subscribe to the fact any defendant has a right to remain silent, there's no question about that, that's his constitutional right. I'm asking you, look at the evidence in the context of the statement given to the FBI agent in November of 1975. That's all I'm asking you to do. And again, to get back to the common sense approach, ladies and gentlemen of the

jury, this is a common sense case. Look at it simply this way: July of 1975 no question this defendant goes into the Citizens Savings Bank, Providence. Any question about that — none. His picture is right there — opens up an account. He admitted that to the agent in his statement. In August of 1975 he goes to Rock Island, Quebec. Any question about that? Mrs. Joyal was positive of his identification. Checks were found in his possession. An $8,000 check travels from Rhode Island to Quebec. Any question about that — look at it, read it when you get up to your jury room. It will tell you right on the check. Use your common sense in making a decision in this case. That's all I ask you to do and I'm quite sure that your verdict will be a proper one. Thank you very much.

MR. DeCELLES: Your Honor.

(Colloquy at side bar between Court and counsel)

MR. DeCELLES: I move for a mistrial based on Mr. Dimitri's reference to my client's silence. I don't think this can be cured by curative instructions. It would so taint this jury that a mistrial is in order.

THE COURT: On that ground your motion is denied.

MR. DeCELLES: I also make the same motion on the basis of the inflammatory remark about my client's religious attire.

THE COURT: I intend to instruct the jury on that point. Your motion is denied.

(Conclusion of side bar colloquy)

THE COURT: Just a couple of comments, members of the jury, before we come to the argument by defendant's counsel. In your consideration of this case in your jury room you look to the facts, members of the jury, as you find the facts, as you find the facts from the evidence in this case and you do so without passion, without prejudice, objectively. A man's religion or a man's attire has no bearing

to the case. It must not enter into your deliberations. All right, Mr. DeCelles.

(Whereupon Mr. Decelles presented closing summation to the jury on behalf of the defendant commencing at 10:37 a.m. and concluding at 10:55 a.m.)